

Date of Hearing: April 21, 2016

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION

Ed Chau, Chair

AB 1820 (Quirk) – As Amended April 11, 2016

SUBJECT: Unmanned aircraft systems

SUMMARY: Regulates the use of unmanned aircraft systems (UAS) by state and local law enforcement agencies by requiring that a law enforcement agency develop a policy on the use of UAS, disclose the proposed policy to the public, and train the agency's officers and staff on the policy before UAS is deployed. Specifically, **this bill**:

- 1) Requires a law enforcement agency that plans to use a UAS, obtain a UAS from another public agency by contract, loan, or other arrangement, use information collected by another agency's UAS, or permit another law enforcement agency to use a UAS within the agency's jurisdiction, to do all of the following:
 - a) If the use of UAS involves capturing images, footage or data from another jurisdiction, then the agency must obtain a warrant (unless an exigent circumstance exists) or enter into a written, public agreement with the appropriate law enforcement agency in the other city, county, or city and county, and that other agency must post the agreement on its website;
 - b) Develop and make available to the public a policy on the agency's use of UAS. The policy must include:
 - i) The circumstances under which a UAS may or may not be used;
 - ii) The rules and processes required before a UAS may be used;
 - iii) The individuals who may access or use a UAS or the information collected via UAS and the circumstances under which those individuals may do so;
 - iv) The safeguards to protect against unauthorized use or access;
 - v) The training required for an individual authorized to use or access information collected via UAS;
 - vi) The guidelines for sharing images, footage, or data with other law enforcement agencies and public agencies;
 - vii) The manner in which information obtained from another public agency's use of UAS will be used; and
 - viii) Mechanisms to ensure the policy is followed.
 - c) Present the proposed policy at a regularly scheduled and noticed public meeting of its governing body with an opportunity for public comment.

- d) Train the agency's officers and staff on the agency's policy before UAS is deployed.
 - e) Follow the agency's policy when deploying UAS.
 - f) Make a good faith effort to minimize the collection of images, footage, or data or persons, places, or things not relevant to the search warrant or justification for using the UAS.
 - g) Destroy any images, footage, or data gathered using UAS within one year, except that:
 - i) UAS images, footage and data may be kept and used longer than a year for training, academic research or teaching purposes;
 - ii) UAS images, footage and data may be kept and used longer than a year if they were originally collected under a search warrant; and
 - iii) UAS images, footage and data may be kept and used longer than a year if they are evidence in any claim, pending litigation, internal disciplinary proceeding, enforcement proceeding, or criminal investigation.
 - h) If the use of UAS involves surveilling private property, then the agency must get a search warrant or express permission from the person with authority to authorize a search, unless there is an "exigent circumstance" including life and death emergencies, hot pursuit situations, search and rescue operations, or to determine the response needed in an emergency or disaster.
- 2) Bans law enforcement agencies, and any other person or entity from arming a UAS, unless permitted by federal law.
 - 3) States that the bill is not intended to conflict with or supersede federal law, including rules and regulations of the Federal Aviation Administration (FAA).
 - 4) Permits a local legislative body to adopt more restrictive policies on local law enforcement use of UAS.
 - 5) Defines terms, including "criminal intelligence," "law enforcement agency," "surveil," and UAS.

EXISTING LAW:

- 1) Provides, pursuant to the United States Constitution, that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." (U.S. Const. amend. IV)
- 2) Provides, pursuant to the California Constitution, that "the right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or

affirmation, particularly describing the place to be searched and the persons and things to be seized.” (CA Const. art. I, Section 13)

- 3) Vests the FAA with the authority to regulate airspace use, management and efficiency, air traffic control, safety, navigational facilities, and aircraft noise. (49 United States Code (U.S.C.) Sec. 40103, 44502, and 44701-44735)
- 4) Requires, under the FAA Modernization and Reform Act of 2012, the FAA to safely integrate UAS operation into the national airspace system by September 30, 2015, and to develop and implement certification requirements for the operation of UAS in the national airspace system. (Public Law Number 112-095)
- 5) Requires law enforcement, in certain instances, to obtain a warrant to search a person or a person’s property and states that a search warrant is an order in writing, in the name of the people, signed by a magistrate, directed to a peace officer, commanding him or her to search for a person or persons, a thing or things, or personal property, and, in the case of a thing or things or personal property, bring the same before the magistrate. (Penal Code (PC) Section 1523)
- 6) Defines physical invasion of privacy in terms of trespassing in order to capture an image, sound recording or other impression in certain circumstances. It also defines constructive invasion of privacy as attempting to capture such an impression under circumstances in which the plaintiff had a reasonable expectation of privacy. (California Civil Code Section 1708.8)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) Purpose of this bill. This bill is intended to protect personal privacy and promote transparency in law enforcement by establishing a set of public parameters for law enforcement use of UAS, commonly known as “drones,” over public and private spaces in California. This measure is author-sponsored.
- 2) Author’s statement. According to the author, “Technology has played a critical role in helping law enforcement groups strategize new ways to fight crime. An unmanned aircraft system (UAS), or drone, can be a great asset to the state and can play an important role in improving public safety. For example, the California Military Department provided firefighters with aerial surveillance while battling the massive Rim Fire in 2013 along the foothills of the Sierra Nevada. This aerial surveillance allowed firefighters to track the fire in real time, allowed commanders to move firefighters out of harm’s way and reposition firefighters as the wind shifted the fire across the mountainside.”

"Drones may also be able to observe areas that are difficult or dangerous for officers to enter; they can help assess dangerous situations (such as a hostage situation or bomb threat) and assist in strategizing responses to these incidents. Though drone technology is growing quickly, high-tech capabilities (such as detailed imaging from high altitudes and the ability to fly long distances) are still under development or cost prohibitive for law enforcement agencies. However, without parameters to guide the use of these devices, the possibility for

abuse exists. AB 1820 requires law enforcement agencies to develop a set of policies to govern the use of drones that will be presented at a regularly scheduled meeting of the governing body to allow for public comment. Additionally, AB 1820 indicates instances in which a warrant is needed for the use of a drone and how long the images captured by a drone may be retained.”

- 3) What is a UAS? The FAA defines a UAS as an unmanned aircraft system and all of the associated support equipment, control stations, data links, telemetry, and communications and navigation equipment necessary to operate the unmanned aircraft. Often more commonly referred to as "drones," a UAS is flown either by a pilot via a ground control system or autonomously through use of an on-board computer.
- 4) FAA regulation of UAS. Current FAA rules prohibit UAS use in FAA airspace but allow commercial, governmental, and research institution users to apply for an exemption from the FAA rules along with an FAA Certificate of Authorization (COA) permitting specific commercial, governmental or research uses. Therefore, law enforcement agencies can obtain a COA to use UAS.
- 5) Regulating law enforcement’s use of UAS. This bill is in part a re-introduction of AB 56 (Quirk) from 2015, which proposed requiring law enforcement agencies to obtain approval from their governing bodies before deploying UAS. AB 56 is currently on the Senate Inactive File as a result of opposition from law enforcement and civil liberties groups.

Like AB 56, this bill requires development of a detailed policy before police deployment of UAS, but instead of requiring approval from the local governing body, this bill mandates only that the governing body hold a public meeting on the policy and provide an opportunity for public comment. The bill specifically authorizes cities and counties to adopt more restrictive policies on local law enforcement use of UAS than this bill requires.

Similar to AB 56 (Quirk) from 2015, this bill also requires that for surveillance of private property, a law enforcement agency must either get a search warrant or get consent from the person with the legal authority to grant access to the property, unless there is an exigent circumstance, such as a hostage or a hot pursuit situation. This bill also carries over some of the AB 56 parameters restricting retention of UAS data to one year and the requirement that law enforcement officials and staff be trained in how to follow the UAS policy. AB 56 passed this Committee on a 9-1 vote on April 30, 2015.

- 6) Recent amendments regarding cross-jurisdictional issues. The California State Sheriff’s Association (CSSA) has expressed a concern that the bill makes operation of UAS near a city’s or county’s borders impractical because the bill requires a law enforcement agency to get a search warrant if operation of the UAS involves capturing images, footage or data from another jurisdiction. CSSA has proposed that operation of UAS in or near neighboring cities and counties should be governed by mutual aid agreements or multi-jurisdictional task forces.

Recent amendments (April 11, 2016) to the bill accomplish three things:

- a) Specifically allow a law enforcement agency to let another law enforcement agency operate a UAS within its jurisdiction as long as the agency enters into a written, public

agreement governing the UAS operation and the agreement is posted on the website of the agency in the jurisdiction where UAS operations will occur;

- b) Clarify that a law enforcement agency only has a duty to make a good faith effort to minimize the collection of images of persons, places, or things unrelated to the reason the UAS is being operated. This amendment is intended to recognize the fact that it is virtually impossible to completely minimize or eliminate the capture of unrelated images; and
- c) Make technical changes to correct Legislative Counsel drafting errors.

The amendments are designed to reduce the number of concerns that law enforcement groups have with the bill but, according to opponents, they do not completely remove opposition from law enforcement groups.

- 7) Prohibition on weaponized UAS. UAS have the capability of being armed with weapons, both lethal and nonlethal. The U.S. has used armed UAS to target militants in military operations abroad. (“Drones Are Weapons of Choice in Fighting Qaeda,” New York Times, Mar. 17, 2009) Domestically, there has been a push by some law enforcement agencies to arm drones to fire rubber bullets and tear gas. (“Drones over US to get weaponized – so far, non-lethally,” RT.com, May 24, 2012)

This bill would ban any person or entity, including a law enforcement agency, from arming UAS with weapons, launchable devices, or other capabilities that may cause incapacitation, injury, death, or property damage.

- 8) Fourth Amendment decisions on the use of aircraft over private property. In considering the specific question of when a person has a reasonable expectation of privacy in the airspace around his or her home, courts have consistently held that while the Fourth Amendment to the U.S. Constitution protects citizens from unreasonable searches and seizures, it does not guarantee privacy. For example, the U.S. Supreme Court in 1986 ruled that the Santa Clara, California police department did not violate the Fourth Amendment when it rented a private plane and viewed the defendant’s backyard marijuana crops from an altitude of 1,000 feet, despite the fact that the yard was surrounded by a 6-foot outer fence and a 10-foot inner fence. (*Cal. v. Ciraolo* (1986) 476 U.S. 207, 209.)

The Court observed that the defendant’s expectation of privacy in his backyard was unreasonable. That the backyard and its crop were within the “curtilage” of respondent’s home did not itself bar all police observation. The mere fact that an individual has taken measures to restrict some views of his activities does not preclude an officer’s observation from a public vantage point where he has a right to be and which renders the activities clearly visible. The police observations here took place within public navigable airspace, in a physically nonintrusive manner. (*Id.* at p. 215.)

From the perspective of some law enforcement agencies, using a UAS to view private property from a public vantage point is akin to giving the police a better set of eyes and would not violate the Fourth Amendment. But unlike the police in *Ciraolo* who rented a private plane and flew it 1,000 above ground, law enforcement’s use of UAS is potentially much more invasive, because a UAS can hover at very low altitudes and capture detailed

photos and videos of activities on the ground.

This bill proposes to require law enforcement agencies to create a detailed UAS policy and vet that policy with the public before deploying UAS to fight crime.

- 9) The Fourth Amendment and new technologies. The U.S. Constitution and the California Constitution guarantee the right of all persons to be secure from unreasonable searches and seizures. This protection applies to all unreasonable government intrusions into legitimate expectations of privacy. (*United States v. Chadwick* (1977) 433 U.S. 1, 7, overruled on other grounds by *California v. Acevedo* (1991) 500 U.S. 565.) In general, a search is not valid unless it is conducted pursuant to a warrant. There are exceptions to the warrant requirement, but the burden of establishing an exception is on the party seeking one. (*Arkansas v. Sanders* (1979) 442 U.S. 753, 760, overruled on other grounds by *California v. Acevedo*, supra.)

Courts have been confronted with questions of how evolving technology intersects with the Fourth Amendment. In *Kyllo v. United States* (2001) 533 U.S. 27, the U.S. Supreme Court considered whether the use of a thermal imager, which detects infrared radiation invisible to the naked eye, to determine whether the defendant was growing marijuana in his apartment, was a search in violation of the Fourth Amendment. The Court held that "[w]here, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." (*Id.* at p. 40.)

Similarly, in *United States v. Jones* (2012) 132 S. Ct. 945, the Supreme Court was presented with a Fourth Amendment challenge to the use of a Global Positioning System (GPS) tracking device by law enforcement officers to monitor the movements of a suspected drug trafficker's vehicle over a period of 28 days. The Court held that the government's installation of the GPS device on the defendant's private property for the purpose of conducting surveillance constituted a "search" under the Fourth Amendment. GPS technology is intrusive because it "generates a precise, comprehensive, record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations. The Government can store such records and efficiently mine them for information years into the future." (*Id.* at pp. 955-956.)

As technology evolves, the Legislature must consider how new technologies should be used in a way that carefully balances the need for public safety against the right to personal privacy. The Court's decisions in *Kyllo* and *Jones* provide some clues as to how courts may ultimately rule on the extent of law enforcement's use of drones. Eventually, the courts may rule that the use of drones to conduct surveillance without a warrant is restricted by the Fourth Amendment. But until a case rises to the 9th Circuit or the U.S. Supreme Court, any restrictions on the use of UAS by law enforcement and other public agencies are left up to the Legislature and local governments.

- 10) California local government action on UAS. Several local governments in California are considering allowing law enforcement to use UAS in their jurisdictions. For example, on April 8, 2015, the San Jose Neighborhoods Commission endorsed a 12-month pilot project allowing the San Jose police department to test UAS. The San Jose City Council is expected

to approve the pilot project, which would begin in 2017. (“Controversial Police Drone Inches Closer To Flight In San Jose,” San Jose Mercury News, April 9, 2015.)

In 2014, the Los Angeles (L.A.) Police Department acquired two UAS from the Seattle Police Department. Following public criticism, the L.A. City Council called on the L.A. Police Commission to develop a policy on the use of UAS before LAPD deploys them. The city’s policy is still in development. (“LAPD’s 2 Drones Will Remain Grounded During Policy Review, Police Commission Says Amid Protest,” KTLA5, September, 14, 2014; and “LA City Council Instructs LAPD, Commission, To Create Drone-Use Criteria,” ABC7, October 28, 2014.)

In 2013, the Alameda County Sheriff’s Department purchased two UAS using the Department’s own funds and without public notice or approval from the Alameda County Board of Supervisors. (“Alameda County Sheriff Reveals that He’s Bought 2 Drones,” S.F. Gate (Dec. 3, 2014).

- 11) The Governor’s veto of AB 1327 (Gorell). In 2014, the Legislature passed AB 1327 (Gorell), which would have required all law enforcement agencies to obtain a search warrant before any use of UAS, except for certain emergencies. However, AB 1327 was vetoed by the Governor on the grounds that the exceptions for emergencies were too narrowly drafted. In his veto message, Governor Brown stated:

"This bill prohibits law enforcement from using a drone without obtaining a search warrant, except in limited circumstances. There are undoubtedly circumstances where a warrant is appropriate. The bill's exceptions, however, appear to be too narrow and could impose requirements beyond what is required by either the 4th Amendment or the privacy provisions in the California Constitution."

- 12) Arguments in support. California Civil Liberties Advocacy (CCLA) writes in support, “CCLA strongly feels that AB 1820 properly balances the privacy interests of individual citizens with law enforcement’s need to detect, prevent, and prosecute crime by requiring sound usage and data retention policies, and by requiring law enforcement to obtain a search warrant in connection with footage obtained for a criminal investigation.”

- 13) Arguments in opposition. The California State Sheriff’s Association states, “[W]e must oppose the provisions that would require ... policies before the legislative body with “jurisdiction” over the law enforcement agency... The state Legislature should not mandate the method in which law enforcement policies are adopted at the local level. We do not believe the public comment period at a board of supervisors meeting – assuming a board of supervisors can be considered the governing body of the office of the elected sheriff – would be conducive to creating appropriate policies and procedures.”

The American Civil Liberties Union of California (ACLU) contends that police should not use UAS without a warrant, stating that, "Drones represent a revolutionary new technology that has the potential to be a useful law enforcement tool but which also creates serious new threats to privacy that must be subject to the controls of a search warrant. As the Supreme Court noted with respect to thermal imaging, '[w]here ... the Government uses a device ... to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a ‘search’ and is presumptively unreasonable without a warrant.'

In *Kyllo v. United States* (2001) 533 U.S. 27, 40.” ACLU also states, “[T]he public-notice provision is so negligible as to be irrelevant because it does no more than to require the agencies create policies that are made available to the public.”

- 14) Related legislation. AB 56 (Quirk) regulates the use of UAS by public agencies, including law enforcement. AB 56 passed the Assembly on a 61-12 vote and is pending on the Senate Inactive File.

SB 262 (Galgiani) would have authorized a law enforcement agency to use a UAS if it complied with the U.S. Constitution and the California Constitution, federal law applicable to the use of UAS by a law enforcement agency, state law applicable to a law enforcement agency’s use of surveillance technology that can be attached to a UAS, and provided the local governing board approved the use. SB 262 was held in the Senate Judiciary Committee.

SB 868 (Jackson) proposes the State Remote Piloted Aircraft Act containing numerous UAS regulations. SB 868 is pending before the Senate Public Safety Committee.

- 15) Prior legislation. SB 15 (Padilla) of 2013 would have imposed a search warrant requirement on law enforcement agency use of a UAS in certain circumstances, would have applied existing civil and criminal law to prohibited activities with devices or instrumentalities affixed to, or contained within a UAS, and would have prohibited equipping a UAS with a weapon, and would have prohibited using a UAS to invade a person's privacy. SB 15 failed passage in the Assembly Public Safety Committee.
- 16) Double-referral. This bill was double-referred to the Assembly Public Safety Committee, where it was heard on March 15, 2015, and passed on a 7-0 vote.
- 17) Reconsideration. This bill was heard by this Committee on April 19, 2016, and failed passage on a 4-6 vote. The author requested and was granted reconsideration where it will heard for vote only on April 21, 2016.

REGISTERED SUPPORT / OPPOSITION:

Support

California Civil Liberties Advocacy (CCLA)
Central Coast Forest Association

Opposition

ACLU
California Peace Officers’ Association (CPOA)
California State Sheriffs’ Association
Consumer Federation of California
Consumer Watchdog
Peace Officers Research Association of California (PORAC)
Privacy Rights Clearinghouse

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